Office Supreme Court, U.S.
FILED
APR 28 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 824

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellee,
State House Annex,
Trenton, New Jersey.

THEODORE I. BOTTER,
Assistant Attorney General,
Of Counsel.

JUSTIN P. WALDER,
Legal Assistant,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

PAGE

Motion to Dismiss and Brief in Support Thereof:

Motion to Dismiss or in the Alternative to Affirm Summarily 1

Questions Presented 1

Statement of the Case 2

Point I—This appeal does not raise a substantial federal question because recent decisions of this Court establish that Chapter 119 is not violative of the Federal Constitution 5

A. The "Establishment" Clause of the First Amendment 5

B. The "Free Exercise" Clause of the First Amendment 7

C. The Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment 8

Point II—The interpretation of N.J.S. 2A:171-4 is a matter of State law and raises no substantial federal question 10

Conclusion 12

Cases Cited

Braunfeld v. Brown, 366 U. S. 599 (1961) 2fn, 4, 7, 8

Gallagher v. Crown Kosher Super Market, 366 U. S. 617 (1961) 2fn, 8

McGowan v. Maryland, 366 U. S. 420 (1961) 2fn, 4-8, 11

PAGE

State v. Fass, 36 N. J. 102, 175 A. 2d 193 (1961) . . . 3, 8, 9, 11

Two Guys from Harrison, Inc. v. Furman, 32 N. J. 199, 160 A. 2d 265 (1960) 2, 3, 6, 9

Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582 (1961) 2fn, 8, 9

State v. Monteleone, 36 N. J. 93, 175 A. 2d 207 (1961) 3

United States Constitution Cited

First Amendment 2-8

Fourteenth Amendment 2, 8

Statutes Cited

L. 1959, Ch. 119 (New Jersey Sunday Closing Law) 2, 3, 3fn, 4, 5, 5fn, 6, 7, 7fn, 8-12

N.J.S. 2A:171-4 . . . . . 4, 10, 11

N.J.S. 2A:171-5.8 . . . . . 2, 5fn, 7fn

N.J.S. 2A:171-5.10 3

N.J.S. 2A:171-5.12 2

Pennsylvania Sunday Closing Law 7-9

Sunday Closing Act (1798) 10

Texts Cited

Paterson's Laws:

p. 329 10

18 Purdon's Pa. Stat. Ann.:

Sec. 4699.10 . . . . . 7fn

"Sunday Legislation", 73 Harv. L. Rev. (1960):

pp. 729, 733, 743, ns. 47, 91 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. _____

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

Motion to Dismiss or in the Alternative to Affirm Summarily

The State of New Jersey moves to dismiss this appeal, on the ground that no substantial federal question is presented, or, in the alternative, to affirm the judgment below summarily, on the ground that said judgment is so clearly correct on the merits that no further argument is required.

Questions Presented

1. Does appellant, a retailer who closes his shop to observe a Saturday Sabbath, raise a substantial federal question in challenging the New Jersey Sunday Closing Law in view of the recent decisions of this Court?

2. Does the interpretation of the New Jersey Sunday Closing Law by the Supreme Court of the State of New Jersey that appellant's commercial activities constitute an open exposure to sell goods disentitling appellant to the immunity otherwise granted to Sabbatarians, raise a substantial federal question or does it involve purely a matter of State law?

Statement of the Case

The New Jersey Sunday Closing Law, Chapter 119 of the Laws of 1959, N.J.S. 2A:171-5.8 *et seq.*, was enacted by the New Jersey Legislature on June 17, 1959. In accordance with N.J.S. 2A:171-5.12 the law is only operative in those counties which approve it by referendum. The law is currently operative in thirteen of New Jersey's twenty-one counties.

The initial challenge to the validity of Chapter 119 was presented to the New Jersey Supreme Court in *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960). It was contended in that case that the Sunday Closing Law violated the "Establishment" Clause of the First Amendment and the "Equal Protection" Clause of the Fourteenth Amendment of the Federal Constitution. the court rejected these very contentions and upheld the validity of Chapter 119.

Subsequent to the determination of *Two Guys from Harrison* v. *Furman*, *supra*, this Court in four separate cases considered the constitutionality of the Sunday Closing Laws of the states of Maryland, Massachusetts and Pennsylvania.[1] This Court held that each of these State

---

[1] *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Two Guys from Harrison-Allentown Inc.* v. *McGinley*, 366 U. S. 582 (1961); *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617 (1961); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961).

Sunday Closing Statutes was valid under the Federal Constitution. In essence, the Sunday Closing Statutes upheld by this Court are comparable to the New Jersey Sunday Closing Law involved herein.

Following the decisions of this Court upholding the constitutional validity of the Sunday Closing Statutes, the New Jersey Supreme Court again considered the constitutional validity of the New Jersey Closing Law in two separate cases. In *State* v. *Montelcone*, 36 N. J. 93, 175 A. 2d 207 (1961) it was contended that Chapter 119 is so vague and unclear as to deprive the appellants therein of liberty and property in violation of the State and Federal Constitutions. Additionally, the appellants sought to challenge the conclusions of the New Jersey Supreme Court, previously rendered in *Two Guys from Harrison* v. *Furman*, *supra*. The court rejected appellants' contentions and held that the New Jersey Sunday Closing Law was valid and violated no provision of the State or Federal Constitutions.

In *State* v. *Fass*, 36 N. J. 102, 175 A. 2d 193 (1961), the case *sub judice*, the appellant raised the question of whether the Sunday Closing Law impinged upon the freedom of those who observed religiously the seventh day of the week, contrary to the First Amendment of the Federal Constitution. The appellant, Fass, is a member of the Orthodox Jewish faith and, in keeping with the tenets of his religion, he abstains from his usual business or occupation on the seventh day of the week and devotes himself exclusively to religious worship. Fass operates a store for the retail sale of floor coverings in West New York, New Jersey.[2] Floor coverings are specifically included as "home furnishings" within the Sunday sale ban, N.J.S. 2A:171-5.10. The

[2] West New York is located in Hudson County which has adopted the Sunday Closing Law by referendum.

appellant was charged with violation of Chapter 119 of the Laws of 1959 and was found guilty and sentenced to pay a fine of $25.00 and costs in the Municipal Court of West New York. This conviction was affirmed at trial *de novo*, in the Hudson County Court, Law Division. Fass appealed to the Appellate Division of the Superior Court and prior to argument the New Jersey Supreme Court certified the matter.

The New Jersey Supreme Court affirmed the conviction below. The court held, upon the authority of *Braunfeld* v. *Brown* and *McGowan* v. *Maryland, supra,* that the New Jersey Sunday Closing Law did not contravene appellant's constitutional rights under the First Amendment of the Federal Constitution and that appellant's activities constituted an open exposure to sell his merchandise in the usual course of his business and he was, therefore, not entitled to the immunity from Sunday closing otherwise accorded Sabbatarians by N.J.S. 2A:171-4.

POINT I

This appeal does not raise a substantial federal question because recent decisions of this Court establish that Chapter 119[3] is not violative of the Federal Constitution.

A. The "Establishment" Clause of the First Amendment

Appellant now contends that the New Jersey Sunday Closing Law violates the "Establishment" Clause of the First Amendment. He states that "The prohibition against work is definitely a form of worship" and a recognition that Sunday "is a day of holy convocation".

This Court in *McGowan* v. *Maryland*, *supra*, 366 U. S. 453, in considering the Maryland Sunday Closing Law, stated that Sunday closing legislation does not violate the "Establishment" Clause of the Federal Constitution unless it can be demonstrated that the purpose or operative effect of the legislation is to use or invoke the coercive power of the state to aid religion.

Appellant argues that the Sunday statutes were enacted originally in the Colonies solely to achieve sectarian ends. If this be true, it is of no moment. The pertinent inquiry

---

[3] Chapter 119, Laws of 1959, N.J.S. 2A:171-5.8, which is set forth in appellant's Jurisdictional Statement on page 4 is not accurately quoted. This section provides:

> "On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, to sell, attempt to sell or offer to sell or to engage in the business of selling, as hereinafter defined, clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings, household, business or office appliances, except as works of necessity and charity or as isolated transactions not in the usual course of the business of the participants."

is whether Chapter 119 of the Laws of 1959 was in fact enacted to aid or subserve religious interests. The Supreme Court of New Jersey in *Two Guys from Harrison* v. *Furman, supra*, 32 N. J. 215, 160 A. 2d 273 in response to a contention, similar to that raised in *McGowan, supra*, that Chapter 119 is a religious statute violating the "Establishment" Clause of the First Amendment, stated:

> "• • • The fact is that Sunday has acquired a special character differentiating it from the other days of the week and this without reference to religious connotation. Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance, it is a secular holiday, a day for play, hobbies, recreation or relaxation. To still others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning."

The court further emphasized that it is within the police power of the state to protect from unreasonable interference the opportunity of the public to find relief from everyday tensions.

It is, therefore, clear that there exists secular justifications for making Sunday a day of rest. As indicated in *McGowan, supra*, at page 435, New Jersey Sunday legislation has been supported by groups other than those with purely religious interests.

In view of the explicit determination of the New Jersey Supreme Court with respect to the purpose and operative effect of Chapter 119 and the holding of this Court in *Mc-*

Gowan, appellant's assertions that Chapter 119 contravenes the "Establishment" Clause of the Federal Constitution cannot be sustained.

B. The "Free Exercise" Clause of the First Amendment

The recent case of *Braunfeld* v. *Brown*, 366 U. S. 599 (1961) dealt with the very issues raised by the appellant. Fass, like Braunfeld, closed his doors on Saturday. Fass, like Braunfeld, alleges that the Sunday Closing Law would so impair his ability to earn a livelihood that it would necessitate his discontinuing in business. As a result, Fass, like Braunfeld, alleges that the statute denies the free exercise of religion as guaranteed by the First Amendment of the United States Constitution. This Court squarely decided the issue against Braunfeld. It stated at 366 U. S. 605:

> "* * * [t]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity * * *."

The Pennsylvania Sunday Closing Law which was involved in *Braunfeld* has a marked similarity to the New Jersey Sunday Closing Law.[4]

---

[4] The following items are proscribed under the Sunday Closing Laws of New Jersey and Pennsylvania:

L. 1959, c. 119 (N.J.S. 2A:171-5.8)

1. clothing or wearing apparel
2. building and lumber supply materials
3. furniture
4. home or business or office furnishings
5. household, business or office appliances

18 Purdon's Pa. Stat. Ann. §4699.10

1. clothing or wearing apparel
2. building and lumber supply materials
3. furniture
4. home or business or office furnishings
5. household, business or office appliances
6. hardware, tools, paints, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, toys, housewares, clothing accessories

The New Jersey Supreme Court rendered its decision in *State* v. *Fass*, 36 N. J. 102, 175 A. 2d 193 (1961), subsequent to this Court's opinions in *McGowan*; *Crown Kosher Super Market*; *Two Guys from Harrison—Allentown* and *Braunfeld*. In light of these determinations, additional briefs and reargument were presented to the New Jersey Supreme Court. The Court in *Fass, supra*, 36 N. J. 106, 175 A. 2d 194 cited *McGowan* and *Braunfeld* as controlling and held that Chapter 119 does not make unlawful any religious practices of the appellant, but that the law simply regulates a secular activity.

In view of the holding of the New Jersey Supreme Court in *Fass* and this Court's decisions in the foregoing cases, appellant's contention that Chapter 119 violates the "Free Exercise" Clause of the First Amendment of the Federal Constitution must be rejected.

C. The Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment

Appellant merely states, "The classification of goods and merchandise is so illusory, arbitrary and capricious that it deprives the defendant of his liberty and property" in violation of the "Equal Protection" Clause of the Fourteenth Amendment of the Federal Constitution. In *McGowan* v. *Maryland*, *supra*, 366 U. S. 425, this Court recognized the wide scope of discretion to be given states in establishing classifications under Sunday closing statutes. In rejecting the contention that the Maryland statute violated the "Equal Protection" Clause, this Court reiterated the doctrine that if any facts may reasonably be conceived to justify the legislative classification, the statute must be upheld.

This Court has already considered the legislative classifications of the Pennsylvania Sunday closing statute in

Two Guys from Harrison-Allentown, supra. It is significant that the classification of commodities under the Pennsylvania statute closely parallels the classification under the New Jersey Sunday Closing Law. (See note 4, *supra.*) Apparently both states have acted to meet similar problems.

In *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 590 (1961), it was found that substantial retail businesses were opening on the highways, and the very commodities enumerated in the Pennsylvania Sunday closing statute were the principal categories of merchandise sold in these establishments. Likewise, the New Jersey Supreme Court stated in *Two Guys from Harrison, Inc.* v. *Furman, supra*, 32 N. J. 209, 160 A. 2d 270:

> "• • • Retail operations spread rapidly upon highways and Sunday selling mounted dramatically. The urban merchant could not effectively meet the challenge. The major roads, already burdened by non-commercial travel, strained under the added stress."

The court further held that the Legislature may classify based upon such considerations as the amount of traffic, noise or other bustle which the sale of these commodities engendered. The evil to which the Legislature has addressed itself was determined by the New Jersey Supreme Court to be the unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose.

In view of the foregoing decisions, the New Jersey Supreme Court, in the instant case, properly determined that appellant's contention that the Sunday Closing Law violated the "Equal Protection" Clause has been foreclosed. The court so stated at 36 N. J. 109, 175 A. 2d 197:

> "The effect of the four Federal cases to which we have referred and the concordant majority decision of this court in *Two Guys from Harrison* v. *Furman*, *supra*, is to establish that L. 1959, Chapter 119, does not deprive retail merchants of equal protection of law."

This Court must reject appellant's argument that there is a violation of equal protection by Chapter 119 in view of its own decisions and that of the New Jersey Supreme Court.

POINT II

The interpreation of N.J.S. 2A:171-4 is a matter of State law and raises no substantial federal question.

The New Jersey Sunday Closing Law, N.J.S. 2A:171-4, grants immunity to Sabbatarians. This immunity first appeared in the general Sunday Closing Act of 1798, *Paterson's Laws*, p. 329, and the language has been carried forward through successive legislation without substantial change. It provides:

> "If any person charged with having labored or worked on Sunday shall prove to the satisfaction of the court that he uniformly keeps the seventh day of the week as the Sabbath, habitually abstains on that day from following his usual occupation or business and from all recreation, and devotes the day to the exercise of religious worship, and if the work or labor for which such person is informed against was done and performed in his dwelling house or workshop, or on his premises, and has not disturbed other persons in the observance of the first day of the week as the Sabbath, then the defendant shall be discharged. This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares,

merchandise or other article or thing in the line of his business or occupation."

Appellant's immunity, therefore, depends upon the nature of this exception and more specifically whether he "openly" exposed "to sale" goods "in the line of his business or occupation".

It was the contention of Fass that the immunity is granted to all Sabbatarians except those who sell their goods by hawking or crying them in the public streets or by maintaining open stands on the public streets or sidewalks. The New Jersey Supreme Court in *Fass, supra*, 36 N. J. 102, 175 A. 2d 193, held that it was not the intention of the New Jersey Legislature in N.J.S. 2A:171-4 to grant immunity to one who opens his store or shop to the public on Sunday for the ordinary operation of the business regularly conducted therein. Moreover, the court emphasized that the immunity section, N.J.S. 2A:171-4, may proscribe the actual sale of a commodity in the line of one's business even if it were not openly exposed to sale. [*See also* concurring opinion of Justice FRANKFURTER in *McGowan* v. *Maryland*, *supra*, 366 U. S. 515, n. 103; "Sunday Legislation", 73 *Harv. L. Rev.* 729, at p. 733 & n. 47; 743 & n. 91 (1960).]

Additionally, it is appropriate to bring before this Court the fact that the appellant has never contended throughout the various State courts and proceedings that he has been denied due process by virtue of his conviction. The first such assertion appeared in appellant's Petition for Rehearing before the New Jersey Supreme Court where it was stated that the immunity section is so vague that it contravenes due process. The appellant has not been timely in raising this issue.

In view of the foregoing, appellant's argument that the immunity provision of the New Jersey Sunday Closing

Law should be construed to embrace all Sabbatarians except those who hawk or cry their wares is purely a matter of interpretation of State law. It involves no substantial or meritorious federal question and should not be considered by this Court.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully requests that this appeal be dismissed, or in the alternative, that the judgment below be summarily affirmed.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellee.

THEODORE I. BOTTER,
Assistant Attorney General,
Of Counsel.

JUSTIN P. WALDER,
Legal Assistant,
On the Brief.